

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN LEE SPANGLER,

Defendant-Appellant.

UNPUBLISHED

December 28, 2006

No. 261375

Hillsdale Circuit Court

LC No. 04-280396-FC

Before: O’Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b). He was sentenced to eleven to thirty years’ imprisonment. We remand for a *Ginther*¹ hearing.

The complainant is the great-nephew of the defendant. By the time of trial, the complainant and his brother were both residents of a facility for juvenile sexual offenders. Before the alleged acts of defendant took place, the brothers sexually offended a younger sister, a cousin, and each other. While at the facility, the complainant’s brother disclosed to a counselor that defendant engaged in sexual acts with him. The complainant’s counselor later spoke with him after a group therapy session. He told the complainant that his brother “was being honest” about “something” with his great-uncle. The complainant then told the counselor that defendant had sexually abused him as well.

Before trial, the prosecution moved for admission of the other-acts testimony of the complainant’s brother. The prosecutor offered the testimony for the purpose of rebutting defendant’s claim of fabrication, to demonstrate a common scheme or plan of gaining the boys’ trust in order to obtain willing participation in sexual acts, and to explain the delay of, and reason for, the complainant’s disclosure. The trial court determined that the testimony was properly admissible under MRE 404(b) to address the character and credibility of the complainant. Before the brother’s testimony, the trial court gave a limiting instruction to the jury that the testimony was only to be used to show a plan, system, or characteristic scheme.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant argues on appeal that the trial court improperly admitted the brother's testimony. Evidence of other crimes, wrongs, or acts of a defendant is inadmissible to prove a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), citing MRE 404(b). Other-acts evidence is admissible, however, for purposes other than to show conformity with character. MRE 404(b)(1). In order to be admissible, the evidence must be (1) offered for a proper purpose; (2) be relevant under MRE 402 as enforced through MRE 104(b); (3) not have its probative value substantially outweighed by unfair prejudice; and (4) the trial court may, upon request, provide a limiting instruction to the jury. *Id.* at 385.

The trial court admitted the testimony on several bases. MRE 404(b) is a rule of inclusion, *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001), and only one proper theory of admission needs to be found, *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). We find that the evidence here was properly admissible to rebut defendant's claim of fabrication.

At trial, the veracity of the complainant's disclosure was a critical issue. The disclosure occurred only after a counselor confronted the complainant with his brother's allegations. Without the brother's testimony, the jury would have been left with a "conceptual void" regarding why, when and how the complainant's disclosure occurred. *Id.* at 502. The nature of the disclosure and the testimony of the complainant's brother were essential to the prosecution's ability to rebut the defense of fabrication. Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. All relevant evidence is inherently prejudicial. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). But, the record in this case does not demonstrate that the jury gave the evidence undue or preemptive weight, or that it was confused by the testimony. *Id.* at 75-76. And, because the testimony was essential to the prosecution's case, its probative value was not substantially outweighed by the danger of unfair prejudice.

Defendant next argues that he is entitled to a new trial because it is apparent on the record that his defense counsel provided constitutionally ineffective assistance of counsel. Defendant raises four claims of ineffectiveness on appeal. We agree that two of these claims, if established, would constitute ineffective assistance of counsel.

Defendant moved the trial court for an evidentiary hearing and new trial on July 22, 2005, which was denied. A defendant must make a testimonial record at the trial court level to support his claims of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Claims of ineffective assistance of counsel require a defendant to show that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced defendant such that he was deprived of a fair trial. See *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). A reviewing court should inspect the challenged action to determine whether it was a sound strategic decision. See *People v Tommolino*, 187 Mich App 14, 17-19; 466 NW2d 315 (1991).

Six weeks before defendant's trial, the complainant's brother accused the boys' mother of sexually abusing both boys. A felony warrant was issued, and the mother later pleaded guilty. Defendant argues on appeal that defense counsel was ineffective because he failed to investigate the brother's allegations against the mother. The failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686

(2004). “Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.*, quoting *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial’s outcome.” *Grant, supra* at 493.

In denying defendant’s motion for an evidentiary hearing, the trial court concluded that the allegations against the mother had no bearing, relevance or materiality to the instant case. We disagree. Relevant evidence is evidence that has any tendency to make the existence of any fact which is of consequence more probable or less probable than it would be without the evidence. MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Materiality is a question whether the evidence pertains to any fact that is of consequence. *Mills, supra* at 67. Evidence is admissible if it is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). The allegations were relevant and material here because they explained the boys’ sexual activity and preoccupation, and they provided the boys with an ulterior motive to fabricate their testimony. The complainant’s brother admitted that he was “humiliated” that he had sexual relations with his mother. It would follow that he was hesitant to name her as his abuser. That humiliation might have provided an ulterior motive for the boys to fabricate allegations against defendant. There is nothing in the record to demonstrate that defense counsel engaged in sound trial strategy by not investigating the allegations against the boys’ mother to support a fabrication defense. To reject a plausible theory of an ulterior motive for fabrication where the outcome turned on a close question of credibility would be the antithesis of a sound trial strategy.

On the record before us, the failure to investigate the allegations and present the evidence to the jury, potentially undermines confidence in the outcome of the trial. The only defense theory was that the boys were fabricating the allegations. Defense counsel provided no motive for the boys’ fabrication at trial, and the boys’ objective behavior made it likely that they had been sexually abused. The prosecution capitalized on that void by arguing that the boys had no reason to lie, and emphasized that, if they had a reason, it would have been presented. Defense counsel tried unsuccessfully to impeach the boys; however, he undermined that defense when he also told the jury that he could think of no reason for the boys to lie. The only evidence presented against defendant was the boys’ testimony, which was generally inconsistent with their pretrial testimony and statements to police. Under those circumstances, there is a reasonable probability that the outcome would have been different had the jury been presented with the allegations against the mother as an ulterior motive for fabrication and an explanation for the boys’ sexual behavior, and we conclude that defendant has made an adequate showing that trial counsel was ineffective such that a *Ginther* hearing is warranted.

Defendant’s second claim of ineffective assistance is that counsel failed to present an expert witness on suggestive or coercive interviewing techniques. Decisions about what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id.* A defense is substantial if it might have made a difference in the

outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

The interviewing protocol and article regarding coercive interview techniques submitted by defendant as an offer of proof shows that several indicators were present in this case to support that the boys were subject to coercive interviewing, leading to their accusations. Protocol, for example, provides that interviewers should not ask leading questions, that those who have an ongoing therapeutic relationship with the child should not conduct interviews, that initial inaccurate responses tend to continue even when a neutral interviewer subsequently questions the child, and that, under some conditions, older children are more suggestible than younger ones. Both boys testified that they were encouraged by their counselors at the juvenile facility to name their abusers; the counselors asked the boys repetitively about the abuse; the victim's counselor suggested defendant as the abuser before the complainant named him; and finally, the brother's counselor accompanied him on his police interview. Defense counsel elicited most of these facts on cross-examination. However, without expert testimony, the jury had no opportunity to consider the reliability of the boys' testimony in relation to information about improper suggestive or coercive interview techniques. Therefore, we agree with defendant that he has made an adequate showing that his trial counsel was ineffective in failing to pursue expert testimony to assist the jury in understanding that the boys' disclosures of abuse were the product of suggestive or coercive questioning to warrant a *Ginther* hearing.

Finally, we briefly address defendant's remaining issues. While the prosecutor's argument was, indeed, improper, it was not so prejudicial that it could not have been cured by a timely objection. Defendant's sentencing issue has no merit. *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006), citing *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Based on this record, we are unable to determine if defendant received effective assistance of counsel, and therefore, remand to the trial court for a *Ginther* hearing. If the trial court determines that defendant received ineffective assistance of counsel, then defendant is entitled to a new trial, and if not, then defendant's conviction and sentence are affirmed.

Remanded to the trial court for a *Ginther* hearing. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Jane E. Markey